Statement of Hon. Mark L. Shurtleff
Attorney General of Utah
Before the U.S. Senate Committee on the Judiciary For the hearing titled "The Constitutionality of the Affordable Care Act"
February 2, 2011

Introduction

Chairman Leahy, Senator Grassley, and members of the Judiciary Committee.

On March 23, 2010, President Obama signed into law a massive new universal healthcare overhaul titled the "Patient Protection and Affordable Care Act," H.R. 3590 (the "Affordable Care Act.") On Monday, January 31, 2011, Senior United States District Court Judge Roger Vinson, declared the entire Affordable Care Act to be unconstitutional and granted a Motion for Summary Judgment brought by me and twenty-six state attorneys general and governors. As Utah Attorney General, it is my legal opinion that, absent a stay of Judge Vinson's order, Utah and the other plaintiff States need not comply with any other mandate contained within the Affordable Care Act. Of course, the federal government is expected to appeal the decision to the Eleventh Circuit, and ultimately the United States Supreme Court will have the final say. In the meantime, I believe it is well and proper for the 112th Congress to reconsider and reevaluate the constitutionality of provisions of the Affordable Care Act, and I appreciate the opportunity to be heard by this committee in that regard.

Judge Vinson's opinion, attached hereto as Exhibit A and incorporated herein by reference (the "Opinion"), is a powerful legal treatise on the history and modern application of the Commerce Clause and the extent of federal power under the Constitution *vis-à-vis* the states. As he pointed out in the opening paragraph of the Opinion, Judge Vinson declared that the case is not about *"our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government."* In so ruling, the judge agreed with the Constitutional arguments advanced by state attorneys general.

For several months prior to passage of the Affordable Care Act, I and a dozen other state attorneys general formed a working group that held regular meetings and conference calls to discuss constitutional and legal concerns raised during the debate in Congress. We jointly wrote to members of Congress to share those concerns and to urge them in crafting federal legislation to consider the impact on state and individual rights and to respect federalism and the Tenth and Fourteenth Amendments to the Constitution. For example, in December 2009, we wrote to House and Senate Conference Committee

negotiators and warned them that a controversial provision (called by some the "Nebraska Compromise," and others the "Cornhusker Kickback"), which was designed to benefit Nebraska's Medicaid program to the detriment of other states, was unconstitutional, and states would sue if it was included in the final version of the law. Gratefully, the negotiators withdrew that provision.

The attorneys general working group continued to discuss and express major concerns regarding other provisions of the House and Senate versions of the proposed healthcare overhaul, most notably the unprecedented encroachment on the liberty of individuals living in our respective states, by mandating that all citizens and legal residents of the United States have qualifying healthcare coverage or pay a tax penalty. We could find nowhere in the Constitution the authority for the United States to enact an "individual mandate," either directly or under threat of penalty, that all citizens and legal residents have qualifying healthcare coverage. By imposing such a mandate, we were convinced that Congress would exceed its powers enumerated in Article I of the Constitution and violate the Tenth Amendment to the Constitution.

While Congress was debating universal healthcare in February and March of 2010, the Utah State Legislature was meeting in its annual forty-five day session, where Utah's elected officials acted boldly to fulfill their responsibility to protect the constitutional rights of the State of Utah and its citizens. On March 8, 2010, the Utah legislature passed H.B. 67, Health System Amendments, sponsored by Representative Carl Wimmer. It states that the then-pending federal government proposals for health care reform "infringe on state powers" and "infringe on the rights of citizens of this state to provide for their own health care" by "requiring a person to enroll in a third party payment system" and "imposing fines on a person who chooses to pay directly for health care rather than use a third party payer." On March 22, 2010, before the Affordable Care Act became law, Utah Governor Gary Herbert signed H.B. 67 into Utah law.

On Sunday night, March 21st, as the United States House of Representatives was taking its final vote on the Affordable Care Act, I and other attorneys general in the state working group were holding a conference call to finalize our complaint challenging its constitutionality. On March 23rd, just a few minutes after President Obama signed it into law, I on behalf of Utah, and twelve other state attorneys general on behalf of their respective states, filed that lawsuit in the United States District Court for the Northern District of Florida. Amended complaints were later filed bringing the current number of plaintiff states to twenty-six.

Notwithstanding the fact that one of the original thirteen attorneys general is a Democrat, my colleagues and I were immediately attacked nationally with allegations that our lawsuit lacked any merit and was simply a partisan political move by "disgruntled Republicans." I gave numerous local and national press interviews strongly rejecting that claim, stating that many provisions of the law were admirable, then arguing that our challenge wasn't about the public policy specifics of needed healthcare reform, but about the legality of the process employed and the authority of Congress to so legislate.

In a nation founded on the rule of law grounded in a constitutional framework, process and authority matter most. Judge Vinson so found. In the Conclusion of the Opinion (OP. 75,) he declared,

> *The existing problems in our national health care system are recognized by everyone in this case. There is widespread sentiment for positive improvements that will reduce costs, improve the quality of care, and expand availability in a way that the nation can afford. This is obviously a very difficult task. Regardless of how laudable its attempts may have been to accomplish these goals in passing the Act, Congress must operate within the bounds established by the Constitution.*

Constitutional Concerns

The lynchpin of our legal challenge was that the "individual mandate" of the Affordable Care Act violated Article 1 of the Constitution and the Tenth Amendment, and was not otherwise authorized by either the Commerce Clause nor the Necessary and Proper Clause. Ultimately Judge Vinson's ruling came down to this single argument. However, we asserted several additional constitutional deficiencies and would ask that Congress consider the following in any future actions relating to the Affordable Care Act or other universal healthcare reform.

We claimed that the tax penalty required under the Affordable Care Act, which must be paid by uninsured citizens and residents, constitutes an unlawful capitation or direct tax, in violation of Article I, sections 2 and 9 of the Constitution of the United States.

The Act also represents an unprecedented encroachment on the sovereignty of the states. For example, it requires that states vastly broaden their Medicaid eligibility standards to accommodate upwards of fifty percent more enrollees, and imposes burdensome new operating rules that states must follow. States are required to spend billions of additional dollars to cover the expansion, and bear additional administrative costs for hiring and training new employees, as well as requiring that new and existing employees devote a considerable portion of their time to implementing the law. This onerous encroachment on state sovereignty occurs at a time when individual states are facing severe budget cuts to offset shortfalls in already-strained budgets, which Utah and other states' constitutions require to be balanced each fiscal year (unlike the federal budget), and at a time when state Medicaid programs already consume a substantial percent of state financial outlays. We argued, and Judge Vinson agreed in *dictum,* that the plaintiff states cannot effectively withdraw from participating in Medicaid, because Medicaid has, over the more than four decades of its existence, become customary and necessary for citizens throughout the United States and because individual enrollment in Plaintiffs' respective Medicaid programs, which presently cover tens of millions of residents, can only be accomplished by their continued participation in Medicaid.

State attorneys general further argue the Affordable Care Act violates the Tenth Amendment in converting what had been a voluntary federal-state partnership into a

compulsory top-down federal program in which the discretion of individual citizens, and elected state policy makers, is removed in violation of the core constitutional principle of federalism.

The Affordable Care Act contains several significant unfunded mandates that will financially burden state and local governments. For example, in most states, there is no government entity or infrastructure that currently exists to sufficiently fulfill all of the responsibilities required to meet requirements related to increases in Medicaid enrollment under the Act, and to operate healthcare insurance exchanges required by the Act. In the case of Utah, our elected policy makers have crafted a model health insurance exchange system that has been recognized and lauded nationally (including by President Obama himself.) However, it is arguable that federal elected officials have required that Utah citizens accept their vision of a cost-effective and workable exchange in place of what state elected officials have already crafted, thereby violating principles of federalism and state soverneighty.

The Affordable Care Act clearly places an immediate burden on states to invest and implement the Act, but by making federal funds available at the discretion of federal agencies, it provides no guarantee that the states will receive such funds or that implementation costs will be met.

In granting our Motion for Summary Judgment last Monday, Judge Vinson closely followed the briefing by plaintiff states and to a large extent adopted our constitutional and analysis and arguments with regard to the individual mandate. Therefore the remainder of my testimony to this committee will refer to and cite to the Opinion and incorporate said findings, conclusions and analysis as representing my own personal legal opinion and testimony as to the constitutionality of the Affordable Care Act as it relates to the individual mandate, and by extension, to the entire Act.

Standing

I would like to point out to the committee that before Judge Vinson could get to the substance of the states' constitutional argument, he had to respond to the federal government's claim that the states lacked standing. Citing Utah's H.B. 67, passed before the Affordable Care Act became federal law, the judge ruled that Utah and Idaho *"through plaintiff Attorneys General Lawrence G. Wasden and Mark L. Shurtleff, have standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors."* He therefore did not have to consider the standing of the other twenty-four plaintiff states.

The Commerce Clause

The Commerce Clause section of Judge Vinson's Opinion (OP.20) closely tracks attorneys general briefing and arguments. Commencing with an 1824 quotation from Chief Justice John Marshall in the first ever Supreme Court analysis of the Commerce Clause, the judge continues with a lengthy discussion of the history of the clause

including the original intent of the Founders, its language and purpose, and the evolution of the Supreme Court's interpretation and application.

The opinion carefully delineates the ebb and flow of the clause's reach, and agrees with plaintiff attorneys general that the Supreme Court in its most recent significant Commerce Clause rulings, *United States v. Lopez (1995)* and *United States v. Morrison (2000), which* began the return the limitation of federal power to its proper historical and constitutional context; and thereby restore the balance between dual sovereigns that had been upset by prior decisions that implied limitless federal authority. This historical discussion is necessary due to the Court's finding that, as I have argued many times, the individual mandate is an unprecedented application of the Commerce Clause.

Beginning on page 38 of the opinion, Judge Vinson explains the individual mandate "differs from the regulations in *Wickard* and *Raich*, [prior Supreme Court Commerce Clause opinions] for example, in that the individuals being regulated in those cases were engaged in an activity (regardless of whether it could readily be deemed interstate commerce in itself) and each had the choice to discontinue that activity and avoid penalty." He further explains,

> *The mere fact that the defendants have tried to analogize the individual mandate to things like jury service, participation in the census, eminent domain proceedings, forced exchange of gold bullion for paper currency under the Gold Clause Cases, and required service in a "posse" under the Judiciary Act of 1789 (all of which are obviously distinguishable) only underscores and highlights its unprecedented nature.*

Because the individual mandate is unprecedented, the judge was required to confront an issue of first impression: "whether activity is required before Congress can exercise its power under the Commerce Clause." (Op.39.) We argued, and the Court agreed, that regulation in the absence of activity would afford Congress the authority to "do almost anything it wanted." (Op. 42.) This would be inconsistent with the history and purpose of the Constitution: "[i]t is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place." (Op. 42.) It would also upset the balance of sovereign powers articulated in *Lopez*: with the power to regulate inactivity, "we would go beyond the concern articulated in *Lopez* for it would be virtually impossible to posit anything that Congress would be without power to regulate." (Op. 43.) The Judge observed that this unreasonable interpretation would empower the government to compel the purchase of any number of goods, from wheat and broccoli to General Motors cars. (Op. 46.)

The Supreme Court has "uniformly and consistently declared that [the Commerce Clause] applies to 'three broad categories of activity.'" (Op. 43.) The health care market is not "unique" as argued by the federal government so that inactivity would somehow be considered activity for purposes of the Commerce Clause. To the contrary, Judge Vinson

ruled pursuant to our argument that because "the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce," the causal chain to allow the federal government to regulate is too long and attenuated to provide the necessary limiting principle. (Op. 50.)

The provisions of the Affordable Care Act that allows the federal government to fine and penalize individuals for the inactivity of NOT purchasing health insurance pursuant to the individual mandate is therefore outside the reach of its Commerce Clause authority.

The Necessary And Proper Clause

The federal government argued that the individual mandate is "necessary and proper" to render effective Congress's regulation of the health insurance market and therefore is constitutionally sound. Judge Vinson articulated the history of the Necessary and Proper Clause, recounting the clause's great controversy and the debate on its necessity and breadth among the Framers.

In our opinion, the individual mandate exemplifies the Framers' very worst fears about how the clause could be abused. Judge Vinson agreed, "[I]f these advocates for ratification had any inkling that, in the early twenty-first century, government proponents of the individual health insurance mandate would attempt to justify such an assertion of power on the basis of this Clause, they probably would have been the strongest opponents of ratification." (Op. 59.) In passing the Affordable Care Act, Congress relied on the clause to solve a problem of its own making, and under this approach Judge Vinson stated, "the more harm the statute does, the more power Congress could assume for itself." (Op. 60.) "Surely this is not what the Founders anticipated, nor how the Clause should operate." (Op. 60.) Further, "To uphold that provision via application of the Necessary and Proper Clause would authorize Congress to reach and regulate far beyond the currently established 'outer limits' of the Commerce Clause and effectively remove all limits on federal power." (Op. 62.)

Therefore, although the individual mandate is arguably "essential" to the Affordable Care Act to produce the policy results its proponents might have intended, it "falls outside the boundary of Congress' Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers." (Op. 63.)

Accordingly, Congress did not have the Constitutional authority to enact the individual mandate and therefore it violates the Tenth Amendment.

Judge Vinson further found because the individual mandate is, as the federal government argued fourteen times in its Motion to Dismiss, the "essential" part of the Affordable Care Act, in cannot be severed. In this regard, the Court explained:

> In the final analysis, this Act has been analogized to a finely crafted watch, and that seems to fit. It has approximately 450 separate pieces, but one essential piece (the individual mandate) is defective and must be

> removed. It cannot function as originally designed. There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate and other health insurance provisions --- which, as noted, were the chief engines that drove the entire legislative effort --- for me to try and dissect out the proper from the improper, and the able-to-stand-alone from the unable-to-stand-alone. . . . The Act, like a defectively designed watch, needs to be redesigned and reconstructed by the watchmaker. (Op. 73-74.)

Conclusion

It is my opinion that Judge Vinson's ruling is an injunction against further implementation of the Affordable Care Act. It is likely that the DOJ will file a notice of appeal and ask the United States Court of Appeals for the Eleventh Circuit to stay that injunction pending its decision. As Utah Attorney General, I will continue with my colleagues in the other twenty-five plaintiff states to litigate all the way to the United States Supreme Court. Hopefully, the parties will agree to, and the court will order, an expedited appeal.

While this critical constitutional issue makes its way through the legal system, I applaud Congress for taking the initiative to conduct a constitutional analysis for itself, and I stand ready to assist or advise in that process in whatever manner requested. Thank you again for the opportunity to present my thoughts, opinion and analysis of the law, and in particular Judge Vinson's recent ruling.